IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 111

DEPARTMENT OF MENTAL HYGIENE OF THE STATE OF CALIFORNIA,

Petitioner,

VS.

EVELYN KIRCHNER, ADMINISTRATRIX OF THE ESTATE OF ELLINOR GREEN VANCE,

Respondent.

BRIEF FOR THE STATE OF ILLINOIS AMICUS CURIAE

On Writ of Certiorari to the Supreme Court of the State of California

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago (1), Illinois (FInancial 6-2000),
Attorney for the State of Illinois,
Amicus Curiae.

RICHARD E. FRIEDMAN,
First Assistant Attorney General of Illinois,
RICHARD A. MICHAEL,
Assistant Attorney General,
JEROME F. GOLDBERG,
JOHN E. COONS,
Special Assistant Attorneys General,
Of Counsel.

Printed by Authority of the State of Illinois 365

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

STATUTES

TEXTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 111

DEPARTMENT OF MENTAL HYGIENE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

EVELYN KIRCHNER, ADMINISTRATRIX OF THE ESTATE OF ELLINOR GREEN VANCE,

Respondent.

BRIEF FOR THE STATE OF ILLINOIS AMICUS CURIAE

On Writ of Certiorari to the Supreme Court of the State of California

---

Interest of the Amicus

The State of Illinois has led the country in the development of a humane and effective mental health program. A part of that program involves a secondary and reciprocal obligation of parents, children, and spouses for a modest part of the cost of care in mental health facilities of the state. The decision below suggests doubt concerning the validity of this important aspect of the Illinois program.

OPINION BELOW

The opinion of the Supreme Court of California is reported at 60 A. C. 704, 388 p. 2d 720, 36 Cal. Rptr. 488 (1964)

Preliminary Statement

Respondent refused payment of sums due the state under the California mental health code for care and treatment of respondent's mother in a state institution. The trial court gave judgment on the pleadings to the state. The District Court of Appeal affirmed. The Supreme Court of California reversed holding the repayment statute void for lack of equal protection, a ground raised by neither party. This Court granted certiorari to examine the equal protection question and the issue of due process arising from the refusal of the court below to permit argument on the question.

The Statutes Involved

The pertinent parts of the California Welfare Institutions Code provide as follows:

§ 6650. **Liability for care.** The husband, wife, father, mother, or children of a mentally ill person or inebriate, the estates of such persons, and the guardian and administrator of the estate of such mentally ill person or inebriate, shall cause him to be properly and suitably cared for and maintained, and shall pay the costs and charges of his transportation to a state institution for the mentally ill or inebriates. The husband, wife, father, mother, or children of a mentally ill person or inebriate, and the administrators of their estates, and the estate of such mentally ill person or inebriate, shall be liable for his care, support, and maintenance in a state institution of which he is an inmate. The liability

of such persons and estates shall be a joint and several liability, and such liability shall exist whether the mentally ill person or inebriate has become an inmate of a state institution pursuant to the provisions of this code or pursuant to the provisions of Sections 1026, 1368, 1369, 1370, and 1372 of the Penal Code. (Stats. 1937, c. 369, p. 1155, § 6650, as amended Stats. 1941, c. 916, p. 2503, § 1; Stats. 1943, c. 1052, p. 2991, § 1; Stats. 1945, c. 247, p. 710, § 1; Stats. 1947, c. 625, p. 1632, § 1.)

§ 6651. Fixing rate; reduction or cancellation of amount; refunds; claims against estate

The rate for the care, support, and maintenance of all mentally ill persons and inebriates at the state hospitals for the mentally ill where there is liability to pay for such care, support, and maintenance, shall be reviewed each fiscal year and fixed at the statewide average per capita cost of maintaining patients in all state hospitals, as determined by the Director of Mental Hygiene. The rate thus fixed shall continue in effect until a new rate is fixed. The Director of Mental Hygiene may reduce, cancel or remit the amount to be paid by the estate or the relatives, as the case may be, liable for the care, support, and maintenance of any mentally ill person or inebriate who is a patient of a state hospital for the mentally ill, on satisfactory proof that the estate or relatives, as the case may be, are unable to pay the cost of such care, support, and maintenance or that the amount is uncollectible.

The Question to Which this Brief is Addressed.

The sole question to which this brief is addressed is the first issue which this Court has undertaken to consider, namely, whether the California repayment statutes are val-

id under the Equal Protection Clause of the 14th Amendment.

Summary of Argument

I. The equal protection clause leaves wide latitude for legislative classification that is not patently invidious. Neither prudence nor precedent suggests any reason that the state may not make the public the beneficiary of a vicarious liability for services rendered so long as the person liable bears some relevant relationship to the person receiving services.

II. Unvarying precedent and common sense support the use of close family relationship as a basis for liability for state services. In any event the legislature could so conclude, and that possibility is sufficient to justify such a classification.

III. The California statute is not arbitrary in its assignment of liabilities, and if it were, the respondent has no standing to raise the issue in this Court.

IV. The great variety of statutory provisions in the different states makes it imperative that any judgment of this Court be focused upon the California statute only.

ARGUMENT.

I.

THE EQUAL PROTECTION CLAUSE DOES NOT PROHIBIT ALL VICARIOUS LIABILITY FOR STATE SUPPLIED SERVICES.

The court below describes the issue before it as follows:

> ". . . the basic question as to equal protection of the law in a case wherein it was sought to impose liability upon one person for the support of another in a state institution." *Department of Mental Hygiene* v. *Kirchner*, 60 Cal. 2d 716, 721, 388 P. 2d 720, 723 (1964).

Whether the court in fact decided this expansive issue is unclear. Certainly it was not necessary to the result. Details of the specific statute at issue were deemed offensive by the court, suggesting a narrower holding. Common criteria of interpretation support such a view. However, several unguarded passages of the opinion have placed in jeopardy all statutory schemes of whatever character which require reimbursement of the state by an individual for services rendered another. The immense implications of such a result urgently require analysis. Treated as a problem in reasonable classification, the proposition that no special relationship between two persons can justify a duty of contribution by one for state benefits extended to the other is at best unsettling.

It is conceded—indeed insisted—that constitutional adjudication of equal protection question is scarcely a scientific process. It is for this very reason that this Court has been unwilling to invade the state domain so long as there appears the merest fragment of justification for the legislative scheme or judicial practice at issue. The 14th Amend-

ment has not been seen as a guarantee that all men regardless of circumstances will be treated precisely alike. It is neither possible nor desirable to imagine such a proposition in any save a totalitarian society. What is demanded by the equal protection guarantee is only that the states draw distinctions between citizens upon a basis free of "invidious discrimination". *Willamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955). Race, of course, is not a basis. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). Poverty is not such a basis. *Griffin* v. *Illinois*, 351 U. S. 12 (1955). Voting domicile is not such a basis. *Reynolds* v. *Sims*, 377 U. S. 533 (1964).

In these three areas the last decade has witnessed a healthy growth in the implementation of the equal protection clause. However, for very sound reasons, this expansion has been tied closely to the types of classification noted —race, poverty, voting domicile. Indeed, most of the decisions relied on by the court below involved statutes drawing distinctions based upon race or poverty. *Oyama* v. *California*, 332 U. S. 633 (1948); *Estate of Tetsubumi* 188 Cal. 645, 206 P. 995 (1922) (race); *Driban* v. *Superior Court*, 37 Cal. 2d 345, 231 P. 2d 809 (1951) (poverty). Meanwhile, other forms of legislative and judicial classification have stood intact under the equal protection clause. The distinction between lawyers and non-lawyers for purposes of the right to engage in the business of "debt adjusting" was upheld. *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963). Sustained also was the imposition of life sentences upon certain three-time criminal offenders despite the concomitant exemption of others guilty of crimes equal in number and of greater gravity. *Oyler* v. *Boles*, 368 U. S. 448 (1961). Sunday closing laws placing a special indirect burden upon Saturday Sabbatarians and Jews were uniformly upheld. See

McGowan v. *Maryland*, 366 U. S. 420 (1961) and related decisions of the same date. In *Williamson* v. *Lee Optical Co.*, *supra*, this Court upheld a very dubious classification of professions even though "The Oklahoma law may exact a needless, wasteful requirement in many cases. . . . it is for the legislature not the Courts, to balance the advantages and disadvantages" . . . *Id.* at 487.

Distinctions based upon race, poverty and voting domicile thus are quite separable for constitutional purposes from other forms of classification. These three categories involve starkly invidious distinctions upon the basis of which no right may be withheld or duty imposed. It would be too much to argue that no equal protection problems arise outside these areas, but, when they do, it is only with the greatest diffidence that the judiciary will reexamine legislative judgment.

In the court below the classification question permitted to dilate into dimensions grossly disproportionate to the issue. There may or may not be an equal protection question under the California Statute, but the solution of this question is not advanced by a general and unsupported attack on all repayment schemes. Rather, the Court in traditional fashion, should have examined the nature of the supporting relationship and its possible relevance to the legislative purpose. It might appropriately have asked whether this relationship is sufficiently proximate and significant that the legislature could suppose it to differ materially from the relationship borne to each other by members of the public. Could this specific social nexus chosen by the legislature in any way relate to or involve the duty—moral or legal—to perform the type of service performed by the state? How far in the way of justification will kinship carry the matter? How far marriage? On another day with another statute

the court below may have to ask other and different questions. How far does employment or co-venture justify a repayment scheme? Is the appropriate boundary of legislative judgment to be perceived in relationships of fault, parenthood, and marriage; or may relationships of agency or employment, and their accompanying vicarious responsibilities also be included by rational legislators? The court may someday be asked whether the state or federal government constitutionally is precluded from insisting that corporate employers share the expense of care in state or federal hospitals for persons injured in the course of employment? But surely all this is not at issue in this case.

Penetration of such questions is not advanced by an inflexible approach to the classification question. What is needed is a careful appraisal of what the legislature might have considered the realities of each program and of the supporting relation of the individuals involved. That necessity has been ignored in this case. To object out of hand to the inclusion of third cousins in a repayment scheme would seem intelligible; but to grandly sweep aside on the basis of an unsupported aphorism all legislative programs of repayment founded upon the intimate and immediate interspousal or parental relationship itself constitutes an arbitrary exercise of judicial power. As we shall elaborate in Part II, until the *Kirchner* case, no court among the many which had considered the matter had held the slightest doubt concerning the efficacy of the familial bond to support repayment programs of the kind at issue here. (See ceses cited *infra*, p. 9)

Finally, to enlarge the grasp of the equal protection clause in this manner is not merely unwise. It is also substantially unintelligible. The California court has ventured far past the boundary of the patently invidious classification, but it offers no new limits. It has adopted the ad hoc reappraisal

of the legislative wisdom as its standard of review. In so doing it has stripped the law of its predictive value. The opinion is a work of profound inscrutability accompanied by no rationale and totally resistant to intelligent generalization. Its future course is as opaque as its origins. A fiat of such indeterminate quality is a radical perversion of the spirit and letter of the equal protection clause and should be so treated by this Court.

It has not been demonstrated by the court below that the public is constitutionally unfit to stand as beneficiary of a vicarious liability for services rendered.

II.

THE IMPOSITION OF A FAMILIAL RESPONSIBILITY FOR STATE SUPPLIED MENTAL HEALTH SERVICES DOES NOT CONSTITUTE AN ARBITRARY CLASSIFICATION.

The familial relation is in itself a benign and useful one and may form the basis for statutory classification. Until the present case no court had presumed to reweigh a family-based classification of duties in a repayment plan except to pronounce it well within the legislative prerogative. Indeed all judicial expression to date has actively praised the wisdom of legislation of the kind at issue here. *Kough* v. *Hoehler*, 413 Ill. 409, 109 N. E. 2d 177 (1956); *People* v. *Hill*, 163 Ill, 186, 46 N. E. 796 (1896); *State* v. *Bateman*, 110 Kan. 546, 204 P. 682 (1922); *State* v. *Webber*, 163 Ohio St. 598, 128 N. E. 2d (1955); *In re Idelman*, 146 Ore. 13, 27 P. 2d 305 (1933); *In re Mansley's Estate*, 253 Pa. 522, 98 A. 702 (1916). If the puzzling holding before this Court becomes the law, the unwavering testimony of these and other courts becomes error and the settled legislative programs of 43

states are in jeopardy. (See Petition for Certiorari, app. C).

The requirement of familial responsibility to the state for services to the family is not only widespread but venerable. These obligations grew out of a general duty of care and support springing from statutes and common law of ancient vintage. From 1601, the Elizabethan poor laws imposed certain reciprocal duties of support on children, parents and grandparents. This statutory duty made unnecessary, in England, the development of comprehensive common law rights of care and support, though the husband, in fact, had such duty with respect to necessities for the wife, including medical care. *Harris* v. *Lee*, 1 P Wms. 482 (1718). In this country, the duty was extended widely by the courts to include the support of minor children. See Madden, *Domestic Relations*, p. 384-5 and numerous citations therein. The establishment of comprehensive reciprocal liabilities for support among all first-degree kin was completed by the legislatures in the 19th and 20th Centuries.

Thus, by virtue of an unbroken common law and statutory development, the reciprocal responsibilities of spouses, children and parents have emerged in a nearly universal pattern. It is these obligations based upon kinship that have been enforced indirectly through the offices of the state under the welfare and mental health programs. The California statute is no exotic sport to be given a wary judicial reception. It is typical Americana in the mainstream of our social life. It represents a pattern to which our people and institutions have long been attuned.

The universality and persistence of such laws go a good distance toward their justification. It is profoundly quixotic to label them as arbitrary. Yet an even more fundamental and positive defense of such legislation can be cast in terms

of its institutional roots and functional value. The taproot of the California statute lies deep in the soil of the family.

Section 6650 is a response to the healthy political doctrine that, when feasible, it is wise to place the legal responsibility where the moral and social responsibility already resides. That obligation here stands first of all upon the familial relationship.

The reciprocal intra-family obligations for support imbedded in the "poor laws" are themselves testimony to the underlying obligation. Convenience, no doubt, played its proper part in the framing of these statutory duties. Yet, convenience is but a function of the underlying relationship. It would not have seemed expedient for the law to saddle remote relatives or strangers with reciprocal statutory obligations, even though their physical proximity or financial ability might exceed that of family members. The responsibility for support is intelligible only as an attachment to a preexisting family relationship that is sometimes undistinguished for convenience and will endure quite apart from that quality.

So the family bond supports the statute, and that, it would seem, is enough for the Constitution; but the statute also supports the family bond and that is even better. It might appear cheap irony to argue that the family of respondent's testatrix will be better off if she loses the instant case. However, the legislature could surely find that the duties involved can be blessings to the family as an institution. The positive benefits to the family from the obligation to repay the state for medical care are at lease these three:

(1). *A reinforcement of Family Integrity.* The statutory duty of partial repayment within the means of the individual is itself a confirmation of the familial bond. It restates objectively the moral union of spouses, parents, and

children. Responsibility for the relative is part and parcel of concern for that relative; the erosion of that responsibility is the hallmark of family disintegration and indifference. The decisions of the California court suggests a view of the family bond as having no greater significance in that state than a mere general bond of human brotherhood. Without criticizing such a view it must be asked whether it is a view so palpably correct that the legislature cannot constitutionally disagree. It surely is a view not shared by her sister states. To imbed this local variation in the national law through the medium of the Fourteenth Amendment is a work of doubtful statesmanship.

(2). *A Protection of the Unwanted.* It would be strange policy to maximize a family's incentives to institutionalize its less popular members. This, however, is precisely the effect of the California court's decision. Every human weakness is now arrayed in support of commitment. If it were the very purpose of the court below to stack the cards against the old, the querulous, and the eccentric, no more potent mechanism could be found than the judgment below. The court has invited those who are inconvenienced or embarrassed by an aging parent to let the state carry not only the emotional burden of the embarrassment but the financial burden as well. It is a policy which will bear evil fruit. Even granting that some will be encouraged to seek needed treatment that might otherwise have been neglected, the legislature clearly has the right to conclude that the dangers outweigh the potential gain. It is difficult enough to maintain a respectable observance of civil liberties in commitment proceedings where the parties all preserve an attitude of disinterested concern. The *Kirchner* case magnifies these difficulties. The court below would award the family a bonus for its successful subversion of those liberties.

Further, even setting aside the dangers of wrongful commitment, without a limited payment scheme the legislature is quite entitled to fear a significant increase in commitments of persons who formerly would have been maintained better within the family. To assert that a man may lawfully be committed is not to say that he should be. The therapy of home and family is often the finest medicine. Indeed, a good share of the new and brilliant mental health program of Illinois—now being copied in many states—is founded upon the purpose and policy of keeping patients proximate to their homes in the name of intelligent and modern therapy. Dependence upon state institutions can be literally bad medicine. The financial incentive offered by the court below will provide the push necessary to induce many a family to jettison its kin upon the broad bosom of the omnicompetent state. In terms of therapy alone, it is a backward step.

If none of this gloomy prognosis were convincing to this Court, it is at least a legitimate concern of the legislature. That, under the Fourteenth Amendment, is quite enough to justify the statute

(3). *Preservation of Flexibility in Choice of Care.* The family which is legally responsible for the care of its members, will necessarily consider modes of care other than those offered by the state. The family is often in the best position to judge which care is desirable—or, at least which kind of institution should be tried first. Unless one is to conclude that state care is inevitably superior or that the family should have no voice in the matter, this flexibility is desirable. However, the option is practically eliminated for all but the wealthy by the decision below.

There are at least two other policy considerations of a quite different character supporting this legislation. The first is the preservation and encouragement of independent

medical institutions. The decision below, as we have just noted, tends to encourage state monopoly and the submergence or total control of private treatment institutions. The barest appreciation of the catalytic role of such free institutions in the progress of medicine suggests the unwisdom of any policy which must sap either their economic vitality or their independence.

The final point in justification of the statute is grounded in the benefits accruing to the entire family from the state services. The court below obscures the point in its mystical reification of the state as parents patriae, but the raw fact is that the family qua family benefits from the care bestowed upon its members. The health or no of each individual is of vital material and social concern to all members of most families. The care which protects that health or restores it is care which, as we have seen, is a legal duty of these very individuals. Consider the benefits—material and otherwise—which accrue to the family from the care and restoration of a wife and mother. The value of affection, companionship, guidance, and education is difficult to calculate in money, but is not the less real. The value of housekeeping, cooking, washing, and the infinity of other services for the family performed by a housewife is measurable in money, and that measure is not insignificant. The suggestion that these benefits accrue primarily to the society at large is a fantasy. To learn that a stranger in another town has returned from an institution restored may be agreeable to anyone. For the family members involved it is an experience central to their personal and corporate lives. The California legislature perceived that difference. It is not irrational that it used it.

Nothing in *Hoeper* v. *Tax Commission*, 284 U. S. 206 (1931) conflicts with these views. The reliance of the court

below upon the *Hoeper* case is misplaced. The quotation from the opinion of Justice Roberts that "The State is forbidden to deny due process or *the equal protection of the laws* for *any purpose whatsoever*" (Italics by the court below) really only poses in another form the question at issue here. We should note also that there are actually the words of Justice McReynolds in *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240 (1926) on a totally different matter. They are merely quoted by Justice Roberts in the *Hoeper* opinion. 284 U. S. at 217. In fact the *Hoeper* case does not even depend upon the equal protection clause for its holding that "The exaction is arbitrary and is a denial of due process." *Id.* at 218.

The matter at issue in the *Hoeper* case was a graduated state income tax measuring a married taxpayer's income by the combined total income of his wife and himself. The Supreme Court invalidated the tax. Justice Holmes dissented joined by Justices Brandeis and Stone. The decision did not, of course, reject the husband-wife relationship as a basis for statutory classification. Furthermore, the *Hoeper* holdings even if taken to involve equal protection has surely been interred by this Court's opinion in *Fernandez* v. *Wiener*, 326 U. S. 340 (1945). There the Federal Estate Tax was under attack insofar as it valued the decedents' estate by the inclusion of the entire marital estate in a community property jurisdiction. The tax was upheld in a unanimous judgment, the Court stating:

> "There can be no doubt that the selection of such a class for taxation would not offend against the Fifth Amendment, or even the Fourteenth . . . Considerations of practical administrative convenience and cost in the administration of tax laws afford adequate grounds for imposing a tax on a well recognized and defined class. . . . Appellees' contention that the uniformity clause

precludes such classification would in effect add to the constitutional restraints upon Congress an equal protection clause more restrictive than that of the Fourteenth Amendment, and is without judicial or historical support. *Id.* at 360-1.

Mr. Justice Douglas, concurring, remarked concerning the *Hoeper* case,

> ". . . I can see no reason why that which is in fact an economic unit may not be treated as one by law." *Id.* at 365.

The *Hoeper* case is at best moribund, but is also irrelevant. It is one thing to object to such classification for purposes of a tax designed solely for the public weal. It is quite another when the "economic unit"—the family—is a prime beneficiary of the state action.

Finally, in this case, as in any examination of legislation, the court ordinarily should ask whether any of the weaknesses it perceives in the statute could be remedied better by judicial intervention or legislative reform. Is new legislation a realistic possibility or is the affected class fundamentally dependent upon the judiciary for change? Tested by such a standard the court below has overreached. The matter at issue is a profoundly and uniquely political question necessitating particularistic political answers in each state. The respondent is not a member of a disenfranchised minority, as in the race or poverty cases, nor even of a disenfranchised majority as in the reapportionment cases. By the very statutory definition at stake the respondent represents an immensely significant political group both in numbers and also in financial means. There is no historic pattern of legislative frustration in this area nor any other reason to suppose that the legislatures are impervious to persuasion through the normal political process. In such a posture judicial intervention is an unwieldly and

unfortunate expedient *supra*: As this Court announced in *Ferguson* v. *Skrupa*,

> ". . . The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas." 372 U. S. at 732.

III.

THE PARTICULARITIES OF THE CALIFORNIA STATUTE ARE INOFFENSIVE TO THE EQUAL PROTECTION CLAUSE.

Much of the foregoing is unnecessary if the holding of the court below is to be taken as limited to the peculiarities of the California legislation. Hopefully such is the case, and it is quite possible to read the opinion as a criticism of the administrative scheme of the statute rather than the classification of responsible individuals already discussed above. Specific objections of the court below lend support to this interpretation. These objections appear to fall in three categories:

(1) the alleged absence of a means test; (2) the alleged absence of a right of contribution against the estate; and (3) administrative discretion of the Director of Mental Hygiene.

(1) *The question of the means test.* The court below complains that the relatives may be "denuded" by the statutory impositions. Despite the language of Sec. 6651 relating to cases where ". . . the estate or relatives . . . are unable to pay . . ." the court declares the liability to be "absolute". Apparently this means that each relative, or all of them, may be totally divested of every possession in order to satisfy the liability. This curious interpretation

of legislative intent in fact has some support. In 1958 the California Supreme Court decided substantially the same kind of issues in *Dep't of Mental Hygiene* v. *Mc Gilvery*, 50 Cal. 2d 742, 329 P. 2d 689. There the court held that "... references to ability to pay in such provisions are a condition only to collectibility ..." 50 Cal. 2d at 756: 329 P 2d at 696.

It would ordinarily constitute the rankest presumption for an amicus brief to disagree with a state supreme court on its own law. However, in the line of cases involving the immediate question, a part of the statute has been consistently overlooked which renders the court's interpretation quite impossible. Note the function of the word "remit" in the following sentence from Sec. 6651:

> "The Director of Mental Hygiene may reduce, cancel *or remit* the amount to be paid by the estate or the relatives ... on satisfactory proof that the estate or relatives ... are unable to pay the cost of such care, support, and maintenance..." (Ital. supplied)

Payment by the patient or relatives may be made in advance. It is in the case of such an advance payment that there will be a duty of the state to remit under Sec. 6651. To put the matter very simply — If the statute authorized the state to "denude" the relatives, there would be no point in remitting anything. That the language of Sec. 6651 was intended to incorporate a means test is clear beyond argument. But, that perhaps, is the difficulty — it has never been argued.

This error in the *Kirchner* opinion is doubly perplexing, since the California legislature made an effort to correct the error after its appearance in the *Mc Gilvery* decision in 1958. The legislature added to the end of the sentence quoted above the words, "or that the amount is uncollec-

tible" to distinguish such a case of uncollectibility from a case of inability to pay. Sec. 6651 as amended Stats. 1959, c. 186, p. 2081, Sec. 1; Stats. 1961, c. 176, p. 1181, Sec. 1. The California Supreme Court unfortunately showed no awareness of that change in the opinion below.

This strange error leaves the matter in a curious posture. If the objection to the absence of a means test is to be taken seriously as an equal protection question, this court may face the unique instance of an obvious error in state law which creates rather than avoids the federal question. Although the decision of the highest court of the state is ordinarily final on questions of state law, this is not true where the nonfederal ground is clearly untenable and would, if adopted, frustrate fundamental constitutional protections. "To hold otherwise would open an easy method of avoiding the jurisdiction of this court". Holmes, J. in *Terre Haute &c. Railroad Co.* v. *Indiana*, 194 U.S. 579, 589 (1904). The state holding should be no more conclusive where the effect of the obvious error is to raise rather than avoid the federal question. It may well be that in such a case this Court would prefer to return the issue for reconsideration by the state tribunal. Whatever course is followed, this Court should not be bound by an utterly insupportable view of the state law.

There is also here a question of standing. Whether or not a means test is required by the statute, the administration has in fact applied one (Pet. for rehearing, p. 30). The respondent's argument is thus theoretical. She must show not the hypothetical effect of a statute that is never applied, but the actual effect of the administrative practice. Until she has done so, there is no injury and no standing in this Court. *Doremus* v. *Board of Education*, 342 U.S. 429 (1952).

(2) *The question of the rights of contribution.* The statutes explicitly provide for the right of contribution among the persons liable under § 6650. This Court below is unfortunately not accurate in its statement on this point, which reads as follows:

> Section 6650 . . . does not even purport to vest in the servient relatives any right of control over, or to recoup from, the assets of the patient. 60 Cal. 2d at 722; 388 P 2d at 724.

Section 6650 in fact declares the liability of the patient and relatives to be ". . . a joint and several liability . . ." Section 1432 of the California Civil Code declares the right of contribution as follows:

> ". . . A party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him."

Here then the same issue of the reviewability of an untenable holding on state law is presented.

However, even assuming there were no right of contribution, there is no standing to raise the question. At no point has respondent sought to exercise her right to contribution. She even failed to join the patients' estate as a party in the state action. The right has never been denied her. *Doremus* v. *Board of Education, supra.*

(3) *Administrative discretion of the Director of Mental Hygiene.* The objections to administrative discretion apparently are twofold: (1) The administrator may arbitrarily choose to collect from one of the relatives; (2) He may strip that relative of his possessions. In the light of the right of contribution and the requirement of ability to pay, these objections simply evaporate. Even accepting them at face value, however, it is clear that the administra-

tive action is subject to judicial review. Indeed the Director cannot collect without bringing a lawsuit. Such discretion is puny indeed.

It is all too clear that the court below inadvertently decided this case with reference to a hypothetical statute bearing little resemblance to the California Welfare and Institutions Code. This code, as it stands, may be an enlightened piece of legislation or of dubious merit — observers may differ. Under either view it deserves another and hopefully closer look before it is treated as having "no rational basis."

IV.

THE VARIETY OF STATUTORY DEVICES ADOPTED BY THE STATES SUGGESTS THE NECESSITY OF A HOLDING CLEARLY LIMITED TO THE CALIFORNIA STATUTE.

The statutory provisions of the various repayment plans of other states face many of the same problems as the California law, but the solutions to these problems differ widely from the California scheme and from each other. Financial ability standards, rights of contribution, priorities among relatives, rights to administrative and judicial review, disposition of the proceeds, and other aspects of repayment plans vary from state to state.

The Illinois Mental Health Code of 1964 is an illustration of one state's way of handling these problems — a way different from the California system, but not on that ground either more or less successful. The repayment provisions of the Illinois Code are reproduced in Appendix A of this brief. 91½ Ill. Rev. Stat. §§ 12-21 to 12-27.

In summary, the Illinois code provides for a primary liability of the patient's own estate. The spouse, parents, or children (with certain exceptions — See § 12-21) are secondarily and equally liable up to a collective maximum of $50 per month. The Department of Mental Health must make determinations of ability to pay and must recompute these findings periodically to reflect cost of living and other changing factors (12-23). Provision is made for intra-departmental petitions to review decisions and for further appeal to a statutory Board of Reimbursement Appeals (12-24). In addition, decisions of the Board are subject to judicial review under the Administrative Review Act (14-1). The sums collected under the payment program go principally into the Mental Health Fund of the State. The balance enters the Psychiatric Training and Research Fund (12-22).

The Illinois Department of Mental Health has adopted elaborate regulations to determine the ability of responsible members of the family to contribute to the patients' support. Some of these regulations are reproduced in Appendix B of this brief. At the present time it is anticipated that the repayment program will produce about 10% of the mental health budget. One-third of this 10% will come from relatives and two-thirds from the patients themselves.

The Illinois program like most or all of the programs of mental health has been carefully drafted to ensure fair procedure and avoidance of hardship. It should have its opportunity with other programs, to be measured against the requirements of the Constitution in an adversary proceeding commenced at the trial level.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago (1), Illinois (FInancial 6-2000),
Attorney for the State of Illinois,
Amicus Curiae.

RICHARD E. FRIEDMAN,
First Assistant Attorney General of Illinois,
RICHARD A. MICHAEL,
Assistant Attorney General,
JEROME F. GOLDBERG,
JOHN E. COONS,
Special Assistant Attorneys General,
Of Counsel.

APPENDIX A.

Section 12-21. Each patient receiving treatment in a Mental Health program of the Department and the estate of such patient is liable for the payment of sums representing charges for treatment of such patient at a rate to be determined by the Department in accordance with the provisions of Section 12-22 of this Act. If such patient is unable to pay or if the estate of such patient is insufficient, the responsible relatives, are severally liable for the payment of such sums, or for the balance due in case less than the amount prescribed under this Act has been paid, provided that: the maximum treatment charges for each patient assessed against responsible relatives collectively shall not exceed $50 per month; the liability of each responsible relative for payment of treatment charges shall cease when payments on the basis of financial ability have been made for a total of 12 years for any patient, and any portion of such 12-year period, during which a responsible relative has been determined by the Department to be financially unable to pay any treatment charges, shall be included in fixing the total period of liability; no child shall be liable under this Act for treatment of a parent who wilfully failed to contribute to the support of such child for a period of at least 5 years during his minority; and that no wife shall be liable under this Act for the treatment of a husband who wilfully failed to contribute to her support for a period of 5 years immediately preceding his hospitalization. Any child or wife claiming exemption because of such wilful failure to support during any such 5-year period shall be required to furnish the Department with clear and convincing evidence substantiating such claim.

Section 12-22. The rate at which the sums for the treatment of patients in a Mental Health program of the Department shall be calculated by the Department is the average per capita cost of the treatment of all such patients, such cost to be computed by the Department on the general average per capita cost of operation of all state hospitals for the mentally ill and the mentally retarded for the fiscal

year immediately preceding the period of state care for which the rate is being calculated, except the Department may, in its discretion, set the rate at a lesser amount than such average per capita cost. The Department in its rules and regulations may establish reasonable fees for treatment furnished to persons in Mental Health programs other than those involving residential care. Less or greater amounts may be accepted by the Department when conditions warrant such action or when offered by persons not liable under this Act. Three-fourths of the amounts so received shall be deposited with the State Treasurer and placed in the Mental Health Fund. The balance, not exceeding the sum of $1,000,000 per fiscal year, shall be retained by the State Treasurer, ex officio, as trustee, in a Psychiatric Training and Research Fund outside the State Treasury and shall be expended for training of psychiatric personnel and for research in mental illness or mental retardation by the Psychiatric Training and Research Authority. If, at any time, the Psychiatric Training and Research Fund unallocated for pending research exceeds the sum of $2,000,000, such excess of said fund shall be restored to the Mental Health Fund. When the amount retained by the Department in any one fiscal year in the Psychiatric Training and Research Fund equals $1,000,000, all amounts collected thereafter for the remainder of that fiscal year shall be deposited with the State Treasurer and paid into the Mental Health Fund.

The Auditor General shall audit or cause to be audited all amounts collected by the Department and all expenditures from the Psychiatric Training and Research Fund. Disbursements from such fund shall be made as nearly as possible in the manner prescribed in Section 9 of "An Act in relation to State finance", approved June 10, 1919, as amended.

Section 12-23. The Department is authorized to investigate the financial condition of each person liable under this Act, and is further authorized to make determinations of the ability of each such person to pay sums representing treatment charges, and for such purposes to set a standard as a basis of judgment of ability to pay, which standard

shall be recomputed periodically to reflect changes in the cost of living and other pertinent factors, and to make provisions for unusual and exceptional circumstances in the application of such standard. The Department may issue to any of the persons liable under this Act, statements of sums due as treatment charges, requiring them to pay monthly, quarterly or otherwise as may be arranged, an amount not exceeding that required under Section 12-21, 12-22, and 12-27 of this Act, plus fees to which the Department may be entitled under Section 8-18 of this Act. Provided, that no admission or detention of a patient in a state hospital shall be limited or conditioned in any manner by the financial status or ability to pay of the patient, the estate of the patient, or any responsible relative of the patient.

Treatment charges assessed against responsible relatives shall be effective on the date of admission or acceptance of the patient for treatment or as soon thereafter as each responsible relative's financial ability during the period which the patient receives treatment subjects him to liability for charges as required under Sections 12-21, 12-22, and 12-27 of this Act. Payment in full by a responsible relative of established treatment charges as provided in Sections 12-21, 12-22, and 12-27 of this Act constitutes full discharge of the liability of such responsible relative, unless there has been material misrepresentation in revealing the extent of financial resources.

Section 12-24. Any person who has been issued a statement of sums due as treatment charges may within one year after such statement has been issued, petition the Department for a release from or modification of such statement, and the Department shall provide for hearings to be held on any such petition. The Department may, after such hearing, cancel, modify or increase such former statement. Furthermore, at any time for due cause the Department may increase the sums due for treatment charges to an amount not to exceed the maximum provided for such person by Sections 12-21 and 12-22 of this Act. Any person aggrieved by the decision of the Department upon such

hearing may, within 30 days thereafter, file a petition with the Department for review of such decision by the Board of Reimbursement Appeals. The Board of Reimbursement Appeals may approve action taken by the Department or may remand the case to the Director with recommendations for redetermination of charges.

A Board of Reimbursement Appeals, consisting of 3 persons appointed by the Governor, is created for the purpose of reviewing decisions of the Department under this Section. The members of such Board shall serve for terms of 3 years commencing January 1 of the year the appointment becomes effective and continuing until their successors are appointed and qualified except that the original members shall serve for terms of 1, 2 and 3 years, commencing January 1, 1964, as designated by the Governor at the time of appointment. Such members shall take and subscribe to the constitutional oath of office and file it with the Secretary of State. They shall receive no compensation but the Department shall reimburse them for expenses necessarily incurred in the performance of their duties. Persons appointed as members of such Board shall have no other connection or duties with the Department.

Upon receiving a petition for review under this Section the Department shall thereupon notify the Board of Reimbursement Appeals, which shall render its decision thereon within 30 days after the petition is filed and certify such decision to the Department. Concurrence of a majority of the Board is necessary in any such decision.

Section 12-25. Upon request of the Department, the State's Attorney of the county in which a responsible relative or a patient who is liable under this Act for payment of sums representing treatment charges resides shall institute appropriate legal action or proceedings against any such responsible relative, patient, or the conservator, guardian, administrator or executor of the estate of such patient who fails or refuses to pay the same. The court shall order the payment of sums due for treatment charges for such period or periods of time as the circumstances require, except that no responsible relative shall be held liable for

charges for treatment furnished to a patient if such charges were assessed more than 5 years prior to the time the action is filed; but such 5-year limitation shall not apply to the liability of a patient or the patient's estate. Such order may be entered against any or all of such defendants and may be based upon the proportionate ability of each defendant to contribute to the payment of sums representing treatment charges. Orders for the payment of money may be enforced by attachment as for contempt against the persons of the defendants, and in addition as other judgments at law, and costs may be adjudged against the defendants and apportioned among them.

The provisions of the "Civil Practice Act", approved June 23, 1933, and all amendments thereto shall apply to and govern all actions instituted under the provisions of this Section.

Section 12-26. Upon the death of a person who is or has been a patient of a state hospital, who is liable for treatment charges and who is possessed of property, it shall be the duty of the executor or administrator or anyone holding assets of the former patient to ascertain from the Department whether any payments were made for the sums due as treatment charges by the deceased person while a patient, and if not, the Department may present a claim for such sums, or for the balance due in case less than the rate prescribed under this Act has been paid. Such claim shall be allowed and paid as other lawful claims against the estate.

Section 12-27. In case any patient, the estate of any patient, or the responsible relatives of such patient shall be unable to pay the treatment charges for the patient provided for by this Act, then the cost of treatment of such patient shall be borne by the State, but the cost of clothing, transportation and other incidental expenses not constituting any part of the treatment shall be defrayed at the expense of the patient, or the estate of the patient, or the responsible relatives of the patient, or of the county of his residence, except that the county shall not be required to

defray expense of clothing; provided, that no child shall be liable under this Act for clothing, transportation, or other incidental expenses of a parent who wilfully failed to contribute to the support of such child for a period of at least 5 years during his minority; provided further, that no wife shall be liable under this Act for clothing, transportation or other incidental expenses of a husband who wilfully failed to contribute to her support for a period of 5 years immediately preceding the hospitalization."

APPENDIX B.

MENTAL HEALTH

REGULATION No. 53:

STANDARDS FOR ABILITY TO PAY TREATMENT CHARGES

Determination of the ability and the amount of the liability of the spouse, parents, or children to pay for the cost of the treatment of a patient in a state hospital, as provided in Section 12-21, 12-22 and 12-23 of the Mental Health Code, shall be made in accordance with the schedule of gross monthly income and number of dependents set forth in this regulation. Monthly income shall be defined to include any and all income of the responsible relative. Dependent persons shall be those persons legally dependent upon the responsible relative for more than one-half of their support.

Charges up to the prevailing maximum rate shall be assessed first against all assets and income of the patient or the estate of the patient until the estate is depleted to an allowable reserve of $500. Valuation of real and personal property shall be included as part of the allowable reserve.

The income of a patient and his assets after subtracting encumbrances shall be subject to charges for the cost of his treatment after the needs of his dependents for a reasonable standard of living are provided. The needs of these dependents shall be based on amounts expended for living costs up to an amount equal to the minimum income for which the responsible relative would be subject to a charge in the attached schedule of charges. These dependents must show actual expenditures of any amounts allowed for their support. Any amounts not expended for the support of these dependents shall be subject to treatment charges.

If a responsible relative who is a legal dependent of a patient is designated as payee of patient benefits and is using such benefits as his income, charges shall be established on the total combined income in accordance with the

attached schedule of charges. In such cases the allowable reserve of $500 shall be waived.

The amount to be paid for treatment charges for the patient shall be in addition to the cost of the patient's clothing and incidental needs. An amount of $20 per month of the monthly income of the patient, or more or less as needed and used, may be allowed for clothing and incidental needs of the patient. Any amount allowed for the patient's clothing and incidental needs which is not expended shall be subject to treatment charges.

All payments received from hospitalization insurance due the patient shall be credited at the prevailing maximum rate of charge.

The patient's beneficial interest in a trust constitutes an estate and shall be subject to charges the same as any patient's estate as set forth in the preceding paragraphs. The net income of a patient which is derived from a life estate or property held in joint tenancy shall be subject to charges up to the prevailing maximum rate.

Charges shall not be assessed for veterans receiving treatment at government expense on a contract with the Veterans Administration for the period from the date of the veteran's admission to the hospital to the date his claim is allowed by the Veterans Administration. Such patients shall be subject to charges from the date the government contract is canceled.

In those cases in which a responsible relative is not able to pay all of the costs of treatment on the basis of current income but has real and/or personal property having a market value in excess of $15,000, the amount of such property over $15,000, in conjunction with income in excess of that amount needed to maintain a reasonable standard of living for the responsible relative for the remainder of his life, and for his dependents for the anticipated periods of their dependency, shall be used as a measure of the ability to pay.

Assets of the responsible relative above the amount of $15,000 after subtracting encumbrances shall be divided by

the number of months of life expectancy of the youngest adult dependent or the number of months required for the youngest dependent to reach majority (age 18 for girls and age 21 for boys), whichever is greater. The most recent table of ordinary life expectancy statistics of the National Office of Vital Statistics shall be used to arrive at the months of life expectancy for adult dependents. The resulting quotient shall be added to the assessable monthly income of the responsible relatives and the combined income shall be applied to the attached schedule of charges. The assessable income of a responsible relative is computed by subtracting from the gross income those allowable deductions specified in Mental Health Regulation No. 54.

Out-of-state residents and alien patients shall be subject to the maximum rate of charge. If arrangements cannot be made for deportation because of conflicting legislation between states, failure to prove residency in another state, or other limiting factors, assessment of charges shall be based on standards set forth in this regulation.

Voluntary payments will be accepted from persons whose incomes are below the minimum base amounts shown on this schedule. Voluntary payments in excess of required amounts will be accepted from responsible relatives as well as from persons not legally responsible.

MENTAL HEALTH

REGULATION No. 53:

SCHEDULE FOR DETERMINING, ON THE BASIS OF GROSS INCOME OF THE FAMILY UNIT, THE AMOUNT TO BE PAID FOR TREATMENT CHARGES FOR THE PATIENT, IN ADDITION TO THE COSTS OF THE PATIENT'S CLOTHING AND INCIDENTAL PERSONAL NEEDS

Monthly Income of the Family Unit	NUMBER OF PERSONS IN THE FAMILY UNIT (Includes head of family and all dependents, but does not include patient)							
	1	2	3	4	5	6	7	8
$250-259	Voluntary payments will be accepted from persons whose incomes are below the minimum base amounts shown on this schedule. Voluntary payments in excess of required amounts will be accepted from liable persons as well as from non-liable persons.							
260-269								
270-279								
280-289								
290-299								
300-309	3							
310-319	6							
320-329	9							
330-339	12							
340-349	15							
350-359	18	3						
360-369	21	6						
370-379	24	9						
380-389	27	12						
390-399	30	15						
400-409	33	18	3					
410-419	36	21	6					
420-429	39	24	9					
430-439	42	27	12					
440-449	45	30	15					
450-459	48	33	18	3				
460-469	50	36	21	6				
470-479	50	39	24	9				
480-489	50	42	27	12				

490-499	50	45	30	15				
500-509	50	48	33	18	3			
510-519	50	50	36	21	6			
520-529	50	50	39	24	9			
530-539	50	50	42	27	12			
540-549	50	50	45	30	15			
550-559	50	50	48	33	18	3		
560-569	50	50	50	36	21	6		
570-579	50	50	50	39	24	9		
580-589	50	50	50	42	27	12		
590-599	50	50	50	45	30	15		
600-609	50	50	50	48	33	18	3	
610-619	50	50	50	50	36	21	6	
620-629	50	50	50	50	39	24	9	
630-639	50	50	50	50	42	27	12	
640-649	50	50	50	50	45	30	15	
650-659	50	50	50	50	48	33	18	3
660-669	50	50	50	50	50	36	21	6
670-679	50	50	50	50	50	39	24	9
680-689	50	50	50	50	50	42	27	12
690-699	50	50	50	50	50	45	30	15
700-709	50	50	50	50	50	48	33	18
710-719	50	50	50	50	50	50	36	21
720-729	50	50	50	50	50	50	39	24
730-739	50	50	50	50	50	50	42	27
740-749	50	50	50	50	50	50	45	30
750-759	50	50	50	50	50	50	48	33
760-769	50	50	50	50	50	50	50	36
770-779	50	50	50	50	50	50	50	39
780-789	50	50	50	50	50	50	50	42
790-799	50	50	50	50	50	50	50	45
800-809	50	50	50	50	50	50	50	48
810-819	50	50	50	50	50	50	50	50

MENTAL HEALTH

REGULATION No. 54:

ALLOWANCES FOR UNUSUAL EXPENSES OR CIRCUMSTANCES IN DETERMINING ABILITY TO PAY TREATMENT CHARGES

If examination reveals unusual expenses or other circumstances which indicate that the gross income is not an adequate measure of ability to pay treatment charges for a patient in a state hospital, allowances for the unusual expenses and circumstances *listed below* shall be made by decreasing the gross income and by using the resultant amount as income in applying the schedule for the purpose of determining the monthly charge.

Proof of payment of the unusual expenses, or proof of circumstances, must be furnished upon request.

1. Expense of medical, dental and related costs, including treatment and orthopedic appliances for various types of handicaps, in excess of 4 per cent of the gross income. Full allowance for medical expenditures of dependents age 65 or over shall be made. Funeral expenses for dependents or other members of the family shall be included as medical expense if such funeral costs are not covered by insurance and are substantiated by a proper receipt.
2. Expense of contributing toward support of relatives, other than dependents, outside the home.
3. Expense of laundry, housekeeper, cleaning woman, babysitter, nursery school, or other care of dependents outside the home, when the responsible relative is the spouse of the patient; for other responsible relatives when such expenses are necessary in connection with the support of minor children or other dependents due to the responsible relative's employment, and therefore no one being at home to perform these services.
4. Expense of education of dependents in excess of $50 per month per dependent.
5. Expense of educational courses for an employed responsible relative.

6. Expense of rent or mortgage payments of responsible relatives in excess of 25 per cent of gross income. In case of mortgages, consideration is given only to required principal and interest on contracts.
7. Expense of maintaining a second home when the responsible relative's family cannot be moved to place of employment.
8. Expense of alimony or court-ordered support paid by the responsible relative.
9. One additional dependency for each when the responsible relative or his spouse is blind.
10. One additional dependency for the responsible relative when age 65 is attained. One additional dependency when the spouse of such responsible relative attains age 65.
11. One additional dependency for the responsible relative when more than one-half of the patient's support is provided by the responsible relative outside of the hospital during the period of assessment of charges.
12. Expense of court-ordered payments on obligations of the responsible relative outstanding at the time of the patient's admission.
13. Expense of clothing and commissary items for a second (or more) patient(s) for whom the relative is responsible.
14. Expense of travel of the responsible relative only when required for the job and if not reimbursed by the employer.
15. Allowance of a dependency for a day care or night care patient when such patient resides in the home of the responsible relative while not receiving treatment.

MENTAL HEALTH

REGULATION NO. 55:

PETITION FOR RELEASE FROM OR MODIFICATION OF TREATMENT CHARGES

Any person who has been billed for amounts due as treatment charges for a patient in a state hospital may petition for a release from or modification of such charges by filing a written request for a hearing with the Department of Mental Health within one year after such bill has been issued.

On the basis of the grievances presented in the petition, the Department may make correction for error or adjustments to meet the objections in the complaint. If not allowed, the Department shall set a date for hearing not more than 90 days thereafter.

Notice of the date, time, and place of hearing shall be mailed to the address given on the petition of the person entering the petition not less than seven days in advance of the date of such hearing. Notice shall be deemed given when deposited in a stamped, addressed envelope in the United States Mail.

A person petitioning shall appear personally and may bring such witnesses as may be deemed necessary and may be represented by a person of his own choice.

The hearing officer duly authorized by the Director of the Department shall conduct the hearing in an orderly manner. He shall have the authority to subpoena witnesses and to compel the production of books and records. All witnesses in such hearing shall swear to or affirm the truth of their testimony.

The common law rules of evidence shall not be enforced in the conduct of the hearing but the hearing officer may ask and receive answer to such questions as are pertinent and proper for a fair determination of the case. Exhibits may be received as part of the evidence and shall be numbered in order according to whether they are the Department's or the petitioner's exhibits.

A certified true copy of the record of the hearing shall be kept by the Department of Mental Health and such record shall be furnished by it to any court or board reviewing its decision, or to a person authorized by the petitioner to examine the record for a legitimate purpose.

The hearing officer shall make a determination on the basis of rules and regulations of the Department and on the evidence presented. The record shall be reviewed by the Director and the decision of the hearing officer shall become final only upon receiving the signature of the Director indicating his assent thereto.

The Department of Mental Health is not authorized nor empowered to review its findings, and neither is it authorized to hold a subsequent hearing based on the same set of facts existing at the time the Department's final order was entered.

Any person aggrieved by the decision of the Department upon such hearing may, within thirty days thereafter, file a petition with the Department for review of such decision by the Board of Reimbursement Appeals. Upon receiving a petition for review by the Board of Reimbursement Appeals, the Department shall notify the Board, which shall render its decision on the petition within thirty days after it is filed and certify its decision to the Department. Concurrence of the majority of the Board is necessary in any such decision. The Board of Reimbursement Appeals may approve action taken by the Department or may remand the case to the Director with recommendations for redetermination of charges.